# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>November 25, 2014 |
| v | No. 317355<br>St. Clair Circuit Court |
| DAVID WAYNE CUTTER,<br><br>Defendant-Appellant. | LC No. 12-002640-FH |

Before: O'CONNELL, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right his conviction by a jury of one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a), for which the trial court sentenced him to 18 months to 15 years' imprisonment. We affirm.

Defendant was convicted of sexually assaulting the 12-year-old complainant, who lived in the same trailer park as defendant. Defendant and his wife were close friends with the complainant's family. Indeed, the complainant and other children in the trailer park referred to defendant and his wife as "Uncle Dave" and "Aunt Kathy." The complainant frequently spent the night with defendant and his wife. On July 11, 2012, the complainant and defendant were staying up late watching a scary movie together. Defendant's wife had already retired for the night. After the movie ended, defendant told complainant, who was scared by the movie, "you can go sleep with Aunt Kathy." The complainant complied and crawled into the couple's bed while defendant's wife slept. At some point, defendant entered the bed. The complainant felt defendant place his left leg over her leg. She then felt defendant's hand squeezing her side. The complainant testified that she felt defendant's penis behind her legs and he started "humping [her] from behind." Eventually, the complainant jumped from the bed and locked herself in the bathroom. In the morning, the complainant returned to her own home and disclosed to her mother the events of the preceding evening. Forensic testing of the complainant's pajama pants found no evidence of staining or any foreign substance on the pants.

Defendant first argues that the trial court violated his right to present a defense when it excluded evidence that the complainant had been inappropriately touched by her stepfather in the past. The trial court excluded the evidence pursuant to Michigan's rape-shield statute, MCL 750.520j.[1] Defendant argues that the evidence was relevant because "child victims of criminal sexual assault, feeling the need to tell what has happened to them but fearful of accusing the true perpetrator will sometimes blame an innocent party." Defendant contends that the rape-shield statute was not intended to apply to evidence of non-volitional sexual conduct. Defendant further asserts that sexual conduct prohibited pursuant to the rape-shield statute does not include child sexual abuse. We disagree. The evidence defendant sought to offer was inadmissible pursuant to the rape-shield statute and defendant has failed to establish any error requiring reversal.

We review for an abuse of discretion a trial court's decision to preclude evidence under the rape shield statute. *People v Adair*, 452 Mich 473, 485; 550 NW2d 505 (1996). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). However, any underlying questions of law related to the applicability of a statute that impacts the evidentiary ruling are reviewed de novo. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

The rape-shield statute bars, with two exceptions, all evidence of the complainant's sexual conduct not incident to the alleged sexual assault. *Adair*, 452 Mich at 481. The statute provides:

> (1) Evidence of specific instances of the *victim's sexual conduct*, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) Evidence of the victim's past sexual conduct with the actor.
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease. [MCL 750.520j (emphasis added).]

[1] We reject the prosecution's argument that the trial court did not preclude the evidence that the complainant had been inappropriately touched by her stepfather in the past. The trial court denied defendant's motion in limine regarding this issue. However, the trial court told defendant he could raise the issue again. At trial, defendant attempted to question the police officer regarding the allegations, and, after the prosecution objected and several minutes of off-the-record conversations occurred, defendant did not continue that line of questioning. Therefore, we hold that the issue was preserved because it was raised, addressed, and decided by the trial court. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007).

The statute does not specifically define sexual conduct. Resolution of the issue presented turns on whether "sexual conduct" includes involuntary child abuse.

At least two cases presume that the statute applies to prior child sexual abuse. In *People v Arenda,* 416 Mich 1, 6; 330 NW2d 814 (1982), the Supreme Court ruled that the rape-shield statute prohibits "any evidence of sexual conduct between the victim [an eight year old boy] and any person other than defendant." In doing so, the Court recognized:

> Furthermore, the only cases in which such evidence can arguably have more than a *de minimis* probative value are ones involving young or apparently inexperienced victims. These children and others are the ones who are most likely to be adversely affected by unwarranted and unreasonable cross-examination into these areas. *They are among the persons whom the statute was designed to protect.* [*Id.* at 13 (emphasis added).]

Further, in *People v Morse,* 231 Mich App 424, 430; 586 NW2d 555 (1998), this Court noted that "[i]n Michigan, as in our sister states, rape-shield statutes are typically invoked where the victim is an adult. However, our courts and others have ruled on the applicability of rape-shield statues in cases of *child sexual abuse*." (Emphasis added.) The decisions in *Arenda* and *Morse* support that the rape-shield statute applies to the evidence defendant sought to admit. Further, because none of the statutory exceptions applied, defendant was properly precluded from eliciting evidence related to allegations that complainant was sexually touched by her stepfather.

In support of his assertion that the rape-shield statute does not apply because child sexual abuse is nonconsensual, defendant relies primarily upon Justice Markman's *dissenting statements* in an *order denying leave to appeal* in *People v Parks*, 483 Mich 1040, 1043; 766 NW2d 650 (2009) (MARKMAN, J., dissenting). In that dissenting statement, Justice Markman concluded that " 'conduct' refers only to *volitional* actions by the victim and does not encompass *involuntary* acts such as those that stem from being subjected to sexual abuse." *Id.* at 1060 (emphasis in original.) In reaching this conclusion, Justice Markman relied on dictionary definitions defining "conduct" as "pertain[ing] to an individual's own behavior, to actions initiated or set in motion by the individual." *Id.* (emphasis in original.) In the same order denying leave to appeal in *Parks*, Justice Young, in a concurring statement, reached just the opposite conclusion, noting that Justice Markman's construction of "conduct" was too limited. *Id.* at 1045 (YOUNG, J., concurring). Also relying on dictionary definitions, Justice Young concluded that "conduct" is defined as one's "personal behavior" and that this definition is silent about whether "conduct" encompasses only voluntary personal behavior or both voluntary and involuntary behavior. *Id.* 1044. According to Justice Young, " 'conduct' encompasses all of one's 'personal behavior.' " *Id.*

Justice Young also concluded that a broader definition of "sexual conduct" was consistent with the statutory scheme of the criminal sexual conduct statutes:

> An examination of the statutory scheme as a whole underscores why Justice Markman's construction of "conduct" is too limited. MCL 750.520a provides definitions for Chapter LXXVI of the Michigan Penal Code, which encompasses the rape shield statute (MCL 750.520j). Although the section does

> not define the word "conduct," it does define both "actor" and "victim" with reference to their "conduct." An "actor" is someone "accused of criminal sexual conduct," MCL 750.520a(a), while a "victim" is someone "subjected to criminal sexual conduct," MCL 750.520a(p). By including these definitions, the Legislature expressed its understanding that "sexual conduct" is something that *both* "actors" *and* "victims" take part in—"actors" voluntarily and "victims" involuntarily. The protections of the rape shield statute, therefore, do not distinguish involuntary "sexual conduct" experienced as a victim of sexual abuse from voluntary "sexual conduct" engaged in as a consenting adult. To hold otherwise would presume that the Legislature intended to give prostitutes more protection than rape victims. I do not think the plain meaning of the term "conduct" within the context of the statute coveys *that* particular legislative intent. [*Id.* at 1045 (YOUNG, J., concurring) (emphasis in original).]

Although neither Justice Markman's nor Justice Young's dissenting and concurring statements are binding precedent, *Benejam v Detroit Tigers, Inc,* 246 Mich App 645, 657, n 9; 635 NW2d 219 (2001), our decision, and current Michigan precedent, discussed *supra*, adopts Justice Young's conclusion. We, therefore, conclude that the rape-shield statute applies in cases of child abuse and precludes evidence of both voluntary sexual conduct and involuntary sexual conduct.

Defendant also argues that the rape-shield statute cannot bar the admission of evidence if to do so would violate his constitutional right to confrontation. In *People v Hackett*, 421 Mich 338, 348-349; 365 NW2d 120 (1984), the Supreme Court recognized that "in certain limited situations evidence [of past sexual conduct] may not only be relevant, but its admission may be required to preserve a defendant's constitutional right to confrontation." The Court identified three circumstances when the admission of such evidence may be warranted: (1) to show a complaining witness's bias, (2) to show a complainant's ulterior motive for making a false charge, and (3) to show that the complainant has made false accusations of rape in the past. *Id.* None of these circumstances apply to the instant case. Defendant does not argue that the evidence establishes a history of a prior false accusation, or that it is relevant to prove the complainant's bias or an ulterior motive for making a false charge.

Finally, because the alleged prior sexual abuse is dissimilar to the charge against defendant, defendant cannot establish that the evidence is relevant. This Court's decision in *People v Byrne*, 199 Mich App 674; 502 NW2d 386 (1993), is instructive. In *Byrne*, the defendant also proffered a transference or "figment of the imagination" theory of defense. This Court recognized that such a defense "might just possibly be sufficiently intertwined with defendant's Sixth Amendment right of confrontation so as to overcome the exclusionary effect of the rape shield statute." *Id.* at 678. The Court cautioned, however, that a trial court considering such an issue "should always favor exclusion as long as exclusion does not abridge the defendant's right of confrontation." *Id.* The Court then went on to state that "[a]t a minimum, defendant in this case would have to establish that the sexual conduct of which he is accused is highly similar to that charged against the victim's father." *Id.* at 679. Although an evidentiary hearing was ordered in *Byrne*, this Court noted that "if the father engaged in relatively dissimilar sexual conduct, the evidence would be inadmissible as irrelevant, its prejudicial impact grossly exceeding its probative value." *Id*. In this case, the alleged prior sexual abuse included only the allegation that the complainant's stepfather "grabbed her buttocks." This is significantly

dissimilar from the allegations made against defendant so as to render the evidence irrelevant to defendant's theory of defense.

Next, defendant challenges the scoring of 15 points for offense variable (OV) 8 and 10 points for OV 19 of the sentencing guidelines. When reviewing a challenge to the scoring of an offense variable, "the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation which an appellate court reviews de novo." *Id.*

It is appropriate to assess 15 points for OV 8 when "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." MCL 777.38(1)(a). Asportation does not require the use of force, however, it does require some movement of the victim beyond that "incidental to committing [the] underlying offense." *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003).

The trial court did not err when it assessed 15 points for OV 8. The evidence established that the complainant was awake and in the living room at the time defendant instructed her to move into the master bedroom. Defendant's wife, who takes several pain medications, was already asleep in the master bedroom. Although defendant argues that this was a safer place because of his wife's presence in the room, this conclusion ignores that the placement of the complainant in defendant's bed facilitated the assault. Sending the complainant into the bedroom encouraged her to go to sleep, which, in turn, permitted defendant to assault the complainant in her sleep. Further, because it was defendant's bed, he was able to slip in beside the complainant without immediately alarming the child. The complainant had never slept in the master bedroom before the night of the incident. Had the complainant been in her usual place in the spare bedroom or the living room couch, defendant's attempt to get in that bed might have immediately distressed the complainant and put her on the defense. Therefore, the trial court did not err when it found that the movement of the complainant to the master bedroom constituted asportation to a situation of greater danger. See *id.* at 647.

Defendant next challenges the assessment of 10 points for OV 19. A trial court must assess 10 points for OV 19 if "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49(c). A court may consider a defendant's conduct after the completion of the sentencing offense. *People v Smith*, 488 Mich 193, 200; 793 NW2d 666 (2010). Threatening or intimidating a victim has been found to constitute an interference with the administration of justice. *People v Hershey*, 303 Mich App 330, 344; 844 NW2d 127 (2013).

We conclude that the trial court did not err when it assessed 10 points for OV 19. The complainant testified that after the sexual assault had been reported to the police, defendant approached her in his car. Defendant asked the complainant if she hated him. When the visibly upset complainant asked defendant a similar question, he replied, "Well, yeah, you never bleeping come over anymore." Complainant testified that she was very scared by this contact with defendant. Approaching the complainant, a 12-year-old child, while she was

unaccompanied, could be perceived as an act of intimidation. Then, expressing anger and disappointment with the child, with whom defendant previously had a trusting and loving relationship, could be interpreted as an act of intimidation or an attempt to influence the child. The trial court did not err in finding by a preponderance of the evidence that defendant attempted to interfere with the administration of justice.

For his final claim of error, defendant argues that his constitutional rights were violated when the trial court sentenced him on the basis of facts not proven to a jury beyond a reasonable doubt. Defendant argues that Michigan's sentencing scheme, which requires proof of sentencing facts by only a preponderance of the evidence, was found constitutionally impermissible in *Alleyne v United States*, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013). In *Alleyne*, the United States Supreme Court held that facts that increase a mandatory minimum sentence must "be submitted to a jury and found beyond a reasonable doubt." *Id.* at 2163. This issue was addressed by this Court in *People v Herron*, 303 Mich App 392; 845 NW2d 533 (2013). In *Herron*, this Court rejected the application of *Alleyne* to Michigan's sentencing scheme finding that the state's scheme was constitutional because "judicial fact-finding within the context of Michigan's sentencing guidelines [is] not used to establish the mandatory minimum floor of a sentencing range." *Id.* at 403. In light of *Herron*, which this Court is bound to follow, MCR 7.215(J)(1), we reject this claim of error.[2]

Affirmed.

/s/ Peter D. O'Connell
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood

[2] In *People v Lockridge*, 304 Mich App 278; 849 NW2d 388 (2014), this Court acknowledged that it was bound by the holding in *Herron*. Recently, our Supreme Court granted leave in *Lockridge*. *People v Lockridge*, 496 Mich 852; 847 NW2d 925 (2014). It thereafter entered an order holding the application for leave to appeal in *Herron* in abeyance pending the decision in *Lockridge*. *People v Herron*, ___ Mich ___; 846 NW2d 924 (2014). A Supreme Court order granting leave to appeal does not diminish the precedential effect of a published opinion of the Court of Appeals. MCR 7.215(C)(2).